No. 91-636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,

Petitioner,

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER FORT GRATIOT SANITARY LANDFILL, INC.

Of Counsel:
Robert A. Fineman
HONIGMAN MILLER SCHWARTZ AND COHN
2290 First National Building
Detroit, Michigan 48226-3583

Harold B. Finn III
(Counsel of Record)
David I. Albin
Richard W. Painter
FINN DIXON & HERLING
One Landmark Square
Stamford, Connecticut 06901
(203) 964-8000
Attorneys for Petitioner Fort Gratiot Sanitary Landfill, Inc.

December 11, 1991

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 91-636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,

Petitioner,

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER FORT GRATIOT SANITARY LANDFILL, INC.

Petitioner, Fort Gratiot Sanitary Landfill, Inc., respectfully submits this reply brief pursuant to Rule 15.6 of the Rules of the Supreme Court of the United States for the purpose of addressing arguments first raised in the Brief in Opposition filed by respondents Michigan Department of Natural Resources and Director of the Department of Natural Resources (the "State").[1]

[1]Petitioner's Statement required by Rule 29.1 appears at page ii of the Petition for a Writ of Certiorari.

ARGUMENT

THE STATE'S ARGUMENT DIRECTLY CHALLENGES THIS COURT'S DECISION IN *CITY OF PHILADELPHIA* V. *NEW JERSEY*, AND, IF ADOPTED, WOULD EMASCULATE THIS COURT'S DECISION IN *DEAN MILK*.

Initially, the State's Brief in Opposition appears to present a reiteration of the State's arguments before the courts below—*i.e.*, that the Waste Importation Restrictions[2] do not impermissibly discriminate against interstate commerce, even though they do discriminate against out-of-state waste as compared to in-county waste, because they are part of a state-wide solid waste management plan which has not been alleged or shown to constitute a "flat prohibition" against the importation of solid waste into counties in Michigan, other than St. Clair County. Brief for Respondents Michigan Department of Natual Resources and Director of the Department in Opposition at 13-16, 22-25.[3] Consequently, the State contends, the Waste Importation Restrictions do not violate the Commerce Clause because they serve "legitimate local interests" and any effect thereof on interstate commerce is "purely incidental and not based on discriminatory intent or purpose." *Id.* at 26-27.

---

[2]Sections 13a and 30(2) of the Michigan Solid Waste Management Act, Mich. Comp. Laws Ann. § 299.413a (1991 Supp.) and Mich. Comp. Laws Ann. § 299.430(2) (1991 Supp.).

[3]In an apparent attempt to obfuscate the issues before the Court, the State has implied, both at the beginning and at the end of its brief in opposition, that Petitioner has improperly suggested that Michigan has in fact closed its borders to all out-of-state waste. As the State is well aware, there is no evidence in the record and no allegation in the pleadings that any county in Michigan, other than St. Clair County, either accepts or rejects the importation of out-of-state or out-of-county waste. All that the record reflects in this respect is, as Petitioner has properly asserted, Petition for Writ of Certiorari at 14, that Michigan has enacted legislation which prohibits the importation of out-of-state and out-of-county waste into any county in Michigan unless such county elects individually to accept such waste

(Footnote continued on following page)

As the State's Brief in Opposition progresses, however, it becomes clear that the State is asserting a new argument—*i.e.*, that the State's authority to regulate the importation of out-of-state solid waste is subject to a different standard under the Commerce Clause than is its authority to regulate the importation from out of state of other articles of commerce. Thus, at the end of its brief, the State implicitly acknowledges that the Waste Importation Restrictions would be deemed to violate the Commerce Clause if *Dean Milk Co.* v. *Madison*, 340 U.S. 349 (1951), *Brimmer* v. *Rebman*, 138 U.S. 78 (1891), and *Polar Ice Cream and Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964), were applicable. *See* Brief of Respondents Michigan Department of Natural Resources and Director of the Department in Opposition at 36-39. Each of these cases is said to be distinguishable, however, because "the laws at issue [in such cases] were specifically designed and expressly found by the Court to be protectionist measures favoring local economic interests," whereas the Michigan Solid Waste Management Act is said to be "intended to address a legitimate state and local health concern and not designed to favor local economic interests or to otherwise have a discriminatory purpose or effect." *Id.* at 36-37. More specifically, the State asserts that *Dean Milk* is inapposite because "Madison's regulation was not essential to the protection of public health and welfare. Here, we are deal-

---

(Footnote continued from previous page)
and that St. Clair County has elected not to allow the importation of such waste. In this connection, it should be noted that the question of whether and to what extent out-of-state waste is allowed to be imported into other Michigan counties is irrelevant to what all parties appear to agree is the only question presented by the Petition—*i.e.*, whether the lower courts erred in not requiring respondents to satisfy the strict scrutiny test of *Maine* v. *Taylor*, 477 U.S. 131, 138 (1986), by sustaining the burden of demonstrating that the Waste Importation Restrictions serve a "legitimate local purpose" which "could not be served as well by available nondiscriminatory means." 477 U.S. at 138.

ing with garbage and where it is disposed—a vital matter of public health." *Id.* at 39.

In like manner, the State seeks to distinguish *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), on the alleged ground that it involved a statute which only purported to promote environmental purposes but in reality constituted simple economic protectionism, Brief of Respondents Michigan Department of Natural Resources and Director of the Department in Opposition at 21, whereas the Michigan Solid Waste Management Act is said to be "a legitimate exercise of police power dealing with Michigan's waste problem and related matters of local importance in which public health and welfare is implicated." *Id.* at 35. Instead, the State now suggests, this case should be governed by what it contends is the different standard of *Sporhase* v. *Nebraska*, 458 U.S. 941 (1982), under which, in the view of the State, Michigan landfills, like Nebraska ground water, have the " 'indicia of a good publicly produced and owned in which a State may favor its own citizens . . . .' " *Id.* at 32 (quoting *Sporhase* v. *Nebraska*, 458 U.S. at 957).

In short, the State's argument is that the decision below should stand because *City of Philadelphia* v. *New Jersey* and *Dean Milk* only prohibit "economic protectionism" and do not apply to state or local legislation which discriminates against out-of-state solid waste so long as such legislation is enacted for the alleged purpose of protecting local public health and welfare. But the State's attempt to limit *City of Philadelphia* v. *New Jersey* and *Dean Milk* to cases involving "economic protectionism" cannot withstand scrutiny since, as this Court stated in *City of Philadelphia* v. *New Jersey:*

> "[I]t does not matter whether the ultimate aim of [the New Jersey law restricting the importation of out-of-state waste] is to reduce the waste disposal costs of New Jersey resi-

> dents or to save remaining open lands from pollution . . . . But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."

437 U.S. at 626-27. Indeed, then Justice Rehnquist's dissent in *City of Philadelphia* v. *New Jersey* was based, in part, upon the Court's implicit rejection of his contention that "New Jersey should be free under our past precedents to prohibit the importation of solid waste because of the health and safety problems that such waste poses to its citizens." 437 U.S. at 632 (Rehnquist, J., dissenting). Similarly, in *Dean Milk* this Court held that the ordinance of the City of Madison requiring local pasteurization of milk violated the Commerce Clause, notwithstanding its assumption that the ordinance was enacted for the purpose of preserving the public health and safety, because reasonable non-discriminatory alternatives, adequate to serve those local interests, were available. *See* 340 U.S. at 353-54. Thus, the State's argument directly challenges this Court's ruling in *City of Philadelphia* v. *New Jersey* and would, if espoused, emasculate this Court's ruling in *Dean Milk*.

The questions of whether *City of Philadelphia* v. *New Jersey* should be overruled or whether *Dean Milk* should be emasculated in order to avoid the application of the principles of *City of Philadelphia* v. *New Jersey* to localities within the various states are far too important to be left to the inferior state or federal courts, with their own potentially parochial interests, and should, therefore, be decided by this Court, regardless of whether the questions relate to sanitary waste, as in the instant case, or to hazardous waste, as in *Hunt* v. *Chemical Waste Management, Inc.*, 584 So. 2d 1367 (Ala. 1991) (upholding

statute imposing higher disposal fee on hazardous waste), *petition for cert. filed* (No. 91-471).[4] Accordingly, a writ of certiorari should issue to review the decision below.

Dated: December 11, 1991

Respectfully submitted,

Of Counsel:
Robert A. Fineman
HONIGMAN MILLER
SCHWARTZ AND COHN
2290 First National Building
Detroit, Michigan
48226-3583

Harold B. Finn III
(Counsel of Record)
David I. Albin
Richard W. Painter
FINN DIXON & HERLING
One Landmark Square
Stamford, Connecticut 06901
(203) 964-8000
Attorneys for Petitioner
Fort Gratiot Sanitary
Landfill, Inc.

---

[4]Since the Court has recently requested that the Solicitor General file a brief setting forth the views of the United States with respect to the *Chemical Waste Management* case, *Chemical Waste Management, Inc.* v. *Hunt*, 60 U.S.L.W. 3359 (U.S. Nov. 12, 1991) (No. 91-47), the Court may also wish to request the views of the United States with respect to the instant case because the views of the United States with respect to the imposition of restrictions on the importation of hazardous out-of-state waste may be different from the views of the United States with respect to the imposition of restrictions on the importation of non-hazardous out-of-state waste. Similarly, because the members of the Court may have differing views with respect to the imposition of restrictions on the importation from out of state of hazardous, as compared to non-hazardous, waste, the Court may wish to issue a writ of *certiorari* with respect to both the decision below and the decision of the Alabama Supreme Court in the *Chemical Waste Management* case.